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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

THE STATES OF NEW YORK, DELAWARE, *et al.*, Appellants, *v.* THE UNITED STATES OF AMERICA, *et al.*, Appellees.	No. 343
THE HONORABLE HORACE A. HILDRETH, GOVERNOR OF THE STATE OF MAINE, *et al.*, Appellants, *v.* THE UNITED STATES OF AMERICA, *et al.*, Appellees.	No. 344
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *et al.*, Appellants, *v.* THE UNITED STATES OF AMERICA, *et al.*, Appellees.	No. 345

REPLY OF THE STATES OF NEW YORK, DELAWARE, ET AL., APPELLANTS IN NO. 343, AND OF THE GOVERNORS OF THE NEW ENGLAND STATES, APPELLANTS IN NO. 344, TO MOTION TO ADVANCE AND FOR DIMINUTION OF PRINTED RECORD.

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Preliminary Statement

These appellants, the several Northern States, which were plaintiffs below and are appellants in No. 343, and the Governors of the New England States, appellants in No. 344, have from the beginning proceeded with all possible expedition, considering the great importance of the case to their

citizens, the complexities of the issues and the magnitude of the record. They desire that the case be expedited in every way consistent with its presentation in such a manner as to serve the convenience of this Court, make possible full and thorough consideration by the Court and thus serve the ends of justice and protect the interests of all parties.

Therefore, these appellants do not oppose appellees' motion that the original record for the Interstate Commerce Commission be not printed, provided that when the circumstances of the case are understood, the condition stated in the motion (p. 4) as the basis thereof exists, namely:

> "If the Court finds that no serious inconvenience would be involved in utilizing the original evidence before the Commission, as distinguished from a printed version thereof, * * *."

It is essential, however, to the interests of these appellants that in passing upon the motion, the Court be advised as to the importance of this condition.

But first, there are in the motion and in the argument in support thereof certain representations which, if not answered, may cause the Court to approach consideration of the motion with impressions which are incorrect and unjust to these appellants, and which, therefore, call for brief reply.

I

As to certain statements and representations made in support of the motion.

Appellees' motion refers to the "direct effect on the shippers and receivers of freight" caused by the Commission's order as being estimated at approximately $2,000,000 per month. It is possible, however, that this reference may convey to the Court the impression that the pendency of the case and the continuance of the inter-

locutory injunction until final decision by this Court will cost the shippers and receivers of freight throughout the country that amount in added freight costs. The exact opposite is, however, the fact.

The orders of the Commission, based upon a conclusion that the class rates should be made uniform throughout the country, would require a reduction of 10 per cent in the class rates for transportation within the South and West and from those territories to so-called Official territory, embracing the appellant States and New England, but it would require a 10 per cent increase in the class rates for transportation within Official territory. Although, of course, the injunction, pending final decision, continues in effect the present rates for shippers in the South and West and bars the reduction ordered therein, the significant fact is, as the records before the Interstate Commerce Commission and the District Court show, that only a relatively small volume of freight is transported at the class rates within the South and West and from those territories to Official territory, whereas in Official territory there is a very large volume of freight upon which the class rates are charged which would be increased by the Commission's orders. The $2,000,000 monthly mentioned in the estimates referred to in appellees' motion, or whatever the sum may be, consists for the most part of the increased freight charges which the orders would impose upon shippers in plaintiff States. It is for this reason that the Commission's orders are of grave consequence to these appellants because of the heavy financial burden which they would impose upon their citizens. And it is for this reason that these appellants have far greater concern in seeking that the case be submitted to this Court in such a way that it can be adequately examined without undue burden upon the Court, than appellees can possibly have in desiring an early decision.

Appellees' motion also apparently suggests that in some way appellants are blameworthy because the printing of the record has not already been begun. There can certainly be no fault, however, in observing the rules and

usual practice of this Court. Especially is this so since, as presently pointed out, it has been appellants' view that it would be incompatible with their request that the Court carefully review the record to observe the insufficiency of the evidence to support the Commission's orders, to ask the Court at the same time to depart from its rule with regard to printing and accept the record in a form which may be inconvenient for its use.

Moreover, appellees' suggestion that appellants should have arranged with the Clerk of the Court to proceed with the printing of the record before indication by this Court of probable jurisdiction is, to say the least, presumptuous since it is appellants rather than appellees who must advance the cost of printing. These appellants are custodians of the funds of their citizens. Although it is true that the right of appeal to this Court is provided by statute and appellants sincerely believe that the Court should note jurisdiction and receive the case, the fact cannot be overlooked that the Court has from time to time dismissed other appeals allowed by statute without noting jurisdiction and hearing argument, and appellants have believed that they could not permit the public funds in their custody to be committed to a large printing expense until assurance had been afforded that the case would be heard on its merits by the indication by this Court of probable jurisdiction in accordance with its usual practice. Moreover, here again the action of appellants is consistent with the usual practice of this Court, and appellants cannot fairly be censured for not voluntarily departing therefrom.

II

As to the printing of the record.

The printing of the evidence before the Interstate Commerce Commission will be costly. The Court's rules impose the burden upon appellants, at least in the first instance, to assume this cost. It should be presumed, therefore, that in not themselves proposing that permission be sought of the

Court to waive printing of the evidence before the Commission, appellants have been motivated by a sense of obligation both to the Court's convenience and to the interest of their clients in an adequate consideration of the issues.

These appellants challenge the decision and orders of the Commission on the ground that they are based upon errors and misconceptions of law, that they are not supported by necessary preliminary findings and that they are contrary to findings which the Commission has made. For a determination on the issues thus raised, detailed examination of the evidence before the Commission is not needed. But these appellants also attack the decision and orders upon the ground that they are without substantial support in the evidence. Appellants cannot but recognize the burden which they have thus assumed in asking this Court to conclude that a voluminous record of over 5,000 pages of testimony and several hundred statistical exhibits, many of them of great size, does not contain substantial evidence to support the Commission's decision and orders. Appellants believe, nevertheless, that their contention in this regard is well taken and that an examination of the entire record will so disclose. However, it is plain that this first impression created by the mere magnitude of the record can only be overcome by a somewhat careful examination of the record and of the nature of its contents. In justice to the cause of their citizens, these appellants must ask this Court to make such an examination. Appellants have considered that they could not themselves ask this Court to undertake the laborious task of examining with the necessary care the voluminous record before the Commission in its original state, as it is now filed with the Clerk. Indeed, these appellants cannot but suppose that the practical physical difficulties of examining the record in its present form with sufficient care to do justice to appellants' contentions as to the insufficiency of the evidence may have been a substantial factor in the adverse decision of the lower court.

If, however, the Court feels that the present form of the record before the Commission will not be an obstacle to the

examination and consideration thereof necessary to an adequate disposition of appellants' contentions, then appellants of course have no desire to delay the proceeding so that the record can be printed and they and their taxpayers will be glad to be relieved of the great expense of such printing.

Respectfully submitted,

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of Counsel.

October 10, 1946.

Certificate of Service.

I certify that true copies of the foregoing Reply to Motion to Advance and for Diminution of Printed Record were this day mailed to the following counsel of record in the said causes:

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Department of Justice,
Washington, D. C.

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Dated this 10th day of October, 1946.

PARKER MCCOLLISTER,
of Counsel for Appellants.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 343, 344, 345

THE STATES OF NEW YORK, DELAWARE, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

THE HONORABLE HORACE A. HILDRETH, GOVERNOR OF THE STATE OF MAINE, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

REPLY OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., TO MOTION TO ADVANCE AND FOR DIMINUTION OF PRINTED RECORD.

H. C. BARRON,
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Attorneys for The Atchison, Topeka and Santa Fe Railway Co., et al.

SIDLEY, AUSTIN, BURGESS & HARPER,
Of Counsel.

Dated: October 8, 1946.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 343.

THE STATES OF NEW YORK, DELAWARE, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

No. 344.

THE HONORABLE HORACE A. HILDRETH, GOVERNOR OF THE STATE OF MAINE, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

No. 345.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

REPLY OF THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., TO MOTION TO ADVANCE AND FOR DIMINUTION OF PRINTED RECORD.

Come now The Atchison, Topeka and Santa Fe Railway Company, *et al.*, appellants (referred to herein as "the Western Lines"), and respectfully offer the following suggestions with regard to the motion of the appellees to advance these cases and for diminution of the printed record:

The Western Lines desire only to defer to the wishes of the Court in respect to the printing of the record. We believe, however, that the Court will want to have before it, in making its decision as to the printing, certain facts which do not appear clearly from the motion.

It is generally recognized that the decision of the Interstate Commerce Commission under review in these proceedings is the most momentous in the history of the Commission, involving considerations of the greatest economic importance both to the shippers and carriers and to the several parts of the country. In order that these cases might be heard and determined as expeditiously as is consistent with an adequate presentation of the record and arguments to the Court, the appellants suggested to the Government, immediately upon the docketing of the appeals, that the parties agree to omit from the printed record all portions of the record of proceedings before the Commission which the Government did not intend to rely upon in support of the Commission's order. Counsel for the Government declined to make any such stipulation and stated that the Government intended to rely upon every

part of the record as supporting the order. The Western Lines have not been informed of any change in this position of the Government.

Since the Government has indicated that it will contend that the order is supported by all portions of the record before the Commission and since the appellants contend that the record in fact contains no evidence supporting the findings and the order, it is believed that the Court's consideration of the admittedly complex issues of these cases will be substantially facilitated if the record is printed in accordance with the normal procedure prescribed by Rule 13. It is difficult for the Western Lines to estimate whether that procedure will delay the final determination, since that depends upon the state of the docket and the length of time necessary as a minimum for printing even a shortened record.

To correct any possible misunderstanding from the motion, it should be noted that the Clerk has not called upon appellants for any fees for printing other than the fees payable upon the docketing of these appeals, which were paid by the appellants on the day of the docketing. It is understood that the Clerk does not prepare a record for the printer until after probable jurisdiction is noted and that therefore any estimate of the printing costs prior to that time would have been premature. Immediately upon the noting of probable jurisdiction, which is expected shortly, and upon advice from the Clerk, the appellants are prepared to deposit the amount which will be estimated by the Clerk for printing the record.

In balancing the advantage of a possible saving of time against the advantage of having a record to which the Court and counsel may readily refer, the Court may desire to know that the Commission instituted this proceeding in 1939, took the case under advisement in July, 1944, and

did not issue its decision until May, 1945, nor its supplemental decision until November, 1945. Its order was not to have been effective until January 1, 1946.

It may also be noted that the maximum basis of all of the class rates now in effect was prescribed by the Commission itself.

Respectfully submitted,

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Sidley, Austin, Burgess & Harper,
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Dated: October 8, 1946.

Certificate of Service.

I certify that true copies of the foregoing Reply of The Atchison, Topeka and Santa Fe Railway Co., *et al.*, to the Motion to Advance and for Diminution of Printed Record were this day mailed to the following counsel of record in the said causes:

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